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No. 01-620

In The

Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION OF SUPERIOR CALIFORNIA, et al.,

Petitioners,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE STATES OF NEBRASKA, ALABAMA, ALASKA, OHIO, SOUTH CAROLINA, WYOMING AND AMERICAN SAMOA, AND EDWIN MEESE III IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE

Amici Curiae move for leave to file the attached brief pursuant to Supreme Court Rule 37(2)(b). The brief is presented on behalf of the states of Nebraska, Wyoming, Ohio, South Carolina, Alaska, Alabama, and the territory of American Samoa, submitted by the States' Attorneys General, who are counsel on the brief. If these Amici alone filed the present brief, no consent for filing would be required under Supreme Court Rule 37(4).

The brief is also presented by Edwin Meese III, in his individual capacity. Mr. Meese served as the 75th Attorney General of the United States. He is a distinguished fellow and holder of the Ronald Reagan Chair in Public Policy at the Heritage Foundation; a member of the Board of Regents of the National College of District Attorneys; distinguished senior fellow, Institute for United States Studies, University of London; and a member of the boards of directors of both the Capital Research Center and Landmark Legal Foundation. Mr. Meese headed an American Bar Association panel which conducted a two-year review of the explosive growth of federal criminal law, and his current research focus includes criminal justice and federalism issues. In his various professional capacities, Mr. Meese is responsible for researching, lecturing, and advising others on criminal justice and federalism issues.

Consent to the filing of this brief has been obtained from both the Petitioners and Respondent in this case, as evidenced by the enclosed letters signed by Theodore B. Olson, Solicitor General, United States Department of Justice, and M. Reed Hopper, Pacific Legal Foundation.

Amici sought and initially obtained verbal consent to file this brief from Neil Levine, Attorney for Intervenors, Environmental Defense Center and Butte Environmental Council. However, on December 6, 2001, Mr. Levine indicated that he was withdrawing his consent to the filing of this amicus brief. Therefore, pursuant to Supreme Court Rule 37(2)(b) amici prepared this motion to obtain leave of the Court for submission of this brief.

Amici Curiae are States, a U.S. territory, and an individual with an interest in having this Court accept a case which reviews the applicability of the Commerce Clause to the takings portion of the Endangered Species Act. This brief presents a different perspective than that of the parties to this case, in that it focuses on the Act's infringement on important rights properly reserved to the States, specifically the rights to regulate property within the States, to enact and enforce criminal laws, and to exercise general police powers to protect the general safety and welfare of the citizens of the States. The brief provides relevant matter not already brought to the Court's attention by the parties by providing a broader context for consideration of the applicable federalism issues.

For the foregoing reasons, amici respectfully request that the Court grant this Motion and accept for filing the attached brief, inclusive of all amici. In the alternative, amici States and Territory respectfully request that this Court accept the attached brief pursuant to Supreme

Court Rule 37(4), striking any amici that are not covered by this provision.

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INTEREST OF AMICUS CURIAE[1]

Nebraska and the other named states submit this brief as amici curiae in support of Petitioners, the Building Industry Association of Superior California, Marvin L. Oates, and the Sacramento Metropolitan Chamber of Commerce. The Petitioners have requested this Court to review two issues. The first issue, and the only issue addressed herein, involves whether the federal power to regulate commerce among the several states extends to regulation of non-economic intrastate activities under the Endangered Species Act.

The Endangered Species Act (the "Act") directs the Secretary of the Interior, through the United States Fish and Wildlife Service (the "Service") to determine whether a species is endangered or threatened. *See* 16 U.S.C. § 1533(a). Once the Service determines that a species is endangered or threatened, the Act affords that species various protections, substantially restricting private conduct. 16 U.S.C. § 1538(a)(1). The Act imposes both civil and criminal sanctions on anyone who "takes," possesses, sells, delivers, transports, ships, or harms, these species by any means whatsoever without a federal permit. *See* 16 U.S.C. §§ 1538(a)(1) and 1540(a) and (b). For each separate violation of the Act, an individual may be subject to a civil penalty of up to $25,000 per violation, and a criminal penalty of up to $50,000 and one year imprisonment. 16 U.S.C. §§ 1540(a) and (b).

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[1] Amicus Curiae authored this brief in its entirety, and no portion thereof was authored by any party to this case. No person or entity, other than the amicus curiae, made monetary contributions to the preparation or submission of this brief.

Of particular interest to the amici States is the Act's prohibition against taking any protected species, which is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The Act has been interpreted to prohibit construction, farming operations, and other otherwise lawful activities on private land. The Act, when directed at non-economic intrastate activities, interferes with important rights properly reserved to the states, specifically the rights to regulate property within the state, to enact and enforce criminal laws, and to exercise general police powers to protect the general safety and welfare of the citizens of the state. It also interferes with the rights of citizens to use their private property.

The Court should resolve this important issue in favor of the Petitioners in order to prevent the Federal Government from taking over the regulation of entire areas of traditional state concern having nothing to do with the regulation of interstate commerce. "Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise. . . . " *McCulloch v. Maryland*, 17 U.S. 316, 405, 4 Wheat. 316, 405 (1819). In a sense, any conduct in this interdependent world arguably has some economic consequence, but this Court has never interpreted Congress' Commerce Clause power so broadly. To the extent that the lower courts' rulings conflict with this Court's Commerce Clause jurisprudence, the States need

this Court to provide guidance on the appropriateness of federal regulation of non-commercial intrastate activities such as those at issue in this case. The amici States respectfully request this Court to provide that needed guidance by granting Petitioners' petition for certiorari.

SUMMARY OF ARGUMENT

When the States were creating the federal government, there was a great fear that a powerful federal government would threaten the ability of the States to govern themselves and would threaten the freedom of individual citizens.

Several mechanisms were put into the Constitution to limit federal power and to prevent federal intrusion into fundamental local issues. Most importantly here, the federal government was given only specific enumerated powers. All other powers were reserved to the States and the people. Except for the Fourteenth Amendment, which is not at issue here, the Constitution has never been amended to increase federal power at the expense of state power.

The fundamental question presented here is whether the framers of the Constitution intended to authorize the federal government to imprison citizens for engaging in otherwise lawful activities such as farming, constructing a house, or driving through a puddle on their own property in order to protect tiny crustaceans or other species that are wholly intrastate and are not part of interstate commerce. If the federal government can exercise a police power this broad and sweeping then the effort of the

framers of the Constitution to limit the power of the federal government will have entirely failed.

A decision in Petitioners' favor would not mean that the federal government would be without means to protect intrastate, non-economic endangered species. Under its spending power, the federal government could purchase habitat and prevent any human activity on its own land. Within limits, it could also offer grants to states to encourage the states to protect endangered species. The federal government could also prohibit the interstate transportation of endangered or threatened species.

If the people of the United States wish to empower the federal government to exercise sweeping local police powers in the absence of interstate commerce, they can amend the Constitution to do so. They have not.

It was never intended that the federal government should have the power to act on every problem. Indeed, it was clearly intended that the federal government should *not* have such power. This Court, in recent years, has recognized this important principle. In order to reinforce its recent Commerce Clause decisions and to further clarify the limits of federal commerce clause power, the Court should grant the Petition.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION IN ORDER TO PROTECT THE STATES AND THEIR CITIZENS FROM THE EXERCISE OF A GENERAL FEDERAL CRIMINAL POLICE POWER UNRELATED TO THE REGULATION OF INTERSTATE COMMERCE.

Congress' Commerce Clause power is an enumerated power under the United States Constitution that was adopted to facilitate trade among the several states, not to provide the federal government with sweeping local police powers to infringe on those rights reserved to the states.

The Constitution creates a Federal Government of enumerated powers. *See* U.S. Const., Art. I, § 8. "The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *United States v. Lopez*, 514 U.S. 549, 552, 115 S. Ct. 1624 (1995) (*quoting* James Madison, The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961)). "Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise. . . . " *McCulloch v. Maryland*, 17 U.S. 316, 405, 4 Wheat. 316, 405 (1819). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal

Government [reduces] the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

"This constitutionality mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.' " *Lopez*, 514 U.S. at 552, 115 S. Ct. 1624 (*quoting Gregory*, 501 U.S. at 458, 111 S. Ct. at 2395). This division of authority protects the States from a powerful federal government threatening their ability to govern themselves and safeguarding the individual liberties of their citizens. Except for the Fourteenth Amendment, which is not at issue here, the Constitution has never been amended to increase federal power at the expense of state power beyond the originally enumerated powers articulated therein.

One of the Constitutionally enumerated powers delegated to Congress was the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. At the time the Constitution was written and ratified, the term "commerce" merely involved "trade or traffic," Nathaniel Bailey, A Universal Etymological English Dictionary (26th ed. 1789), and concerned an "[e]xchange of one thing for another," Thomas Sheridan, A Complete Dictionary of the English Language (6th ed. 1796). This delegation was necessary to provide a framework for trade among the several states, to encourage and protect interstate commerce, not to regulate intrastate activities.

As defined in *Gibbons v. Ogden*, 9 Wheat. 1, 189-90, 6 L. Ed. 23 (1824): "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of

nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." The commerce power "is the power to regulate, that is, to prescribe the rule by which commerce is to be governed." *Id.* at 196. However, the commerce power does not extend to that "which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Id.* "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State." *Id.* at 194-95.

In *Lopez*, this Court reviewed in great detail the development of the law relating to Congress' Commerce Clause authority. *See Lopez*, 514 U.S. at 551-59, 115 S. Ct. at 1626-1630. The Court noted that even in an era of expanded congressional power, the Court maintained limits on the scope of commerce power to avoid "effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* at 554, 115 S. Ct. at 1628-29 (*quoting Jones & Laughlin Steel*, 301 U.S. 1, 37, 57 S. Ct. 615, 624 (1937)). The Court has continued to recognize that "the powers delegated by the . . . Constitution to the federal government are few and defined," unlike those retained by the states which "are numerous and indefinite." *Lopez*, 514 U.S. at 552, 115 S. Ct. at 1626 (*quoting*

James Madison, The Federalist No. 45, pp. 292-293). With this constant in mind, the Court has construed the commerce clause to permit Congress to regulate just three areas of commercial activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of, or persons or things in, interstate commerce; and (3) other activities that "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 557-59.

The Court has never construed the power to regulate commerce to include a general police power over local crimes, torts, family law and other social matters. Furthermore, this court has expressly held that "[t]he regulation and punishment of intrastate violence that is not directed at [interstate commerce] has always been the province of the States." *United States v. Morrison*, 529 U.S. 598, 618, 120 S. Ct. 1740, 1754 (2000) (*citing Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257 (1821)). "[T]he Constitution reserves the general police power to the States . . . and cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate." *Id.* at 619, 120 S. Ct. at 1754, Fn. 8 (citations omitted). If Congress has no constitutional power to regulate or punish intrastate violence against human beings, then clearly it has no constitutional power to regulate or punish intrastate violence against crustaceans, insects, or other lesser life forms.

The Petition raises an important question concerning the balance of state versus federal power under the Constitution of the United States that should be resolved by this Court.

II. THIS COURT SHOULD GRANT CERTIORARI TO REINFORCE ITS RECENT COMMERCE CLAUSE DECISIONS AND FURTHER CLARIFY THE LIMITS OF FEDERAL COMMERCE CLAUSE POWER.

In *Lopez* and *Morrison*, this Court set forth important principles that were to be applied when federal legislation is challenged for exceeding Congress' power under the interstate Commerce Clause. Those principles were either ignored or seriously misapplied by the lower courts in this case. The Court should grant the Petition in order to ensure that its recent Commerce Clause rulings will be properly applied by the lower federal courts in the future.

The actions at issue in this case involve the "taking" of an intrastate species on private property within a state's boundaries. Of particular concern to the amici States are activities that, if prohibited, pose a threat to local land use rights traditionally reserved to the regulatory powers of the states and put an individual at risk for substantial civil and criminal penalties (including imprisonment) for otherwise lawful activities. For example, the Act clearly contemplates the prohibition of personal use of one's land that might interfere ever so slightly with an endangered species such as the fairy shrimp. This could involve a multi-million dollar land development project, or it could be something as slight as two young children playing baseball in their backyard. Either of these activities could impede upon a small vernal pool, thus "taking" a fairy shrimp for purposes of the Act and resulting in a violation subject to substantial civil and criminal penalties. Effectively, an individual

could be imprisoned for simply walking on his own land. The Act's anti-takings provision does not differentiate between activities that are non-commercial and commercial in nature, nor does it contain a jurisdictional requirement that an activity substantially relate to interstate commerce to be a violation. Clearly the anti-takings provision exceeds Congress' authority under the Commerce Clause, and this Court should find the Act unconstitutional to the extent it applies to wholly intrastate non-commercial activities.

In *Lopez*, this Court struck down the Gun-Free Schools Zone Act as an invalid exercise of Congress' Commerce Clause authority. *Lopez*, 514 U.S. 549, 115 S. Ct. 1624. The Gun-Free Schools Zone Act prohibited possession of a gun within 1,000 feet of a school. *Id.* Although guns are bought and sold across state lines, this Court held that the Act "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561, 115 S. Ct. at 1631. Additionally, this Court found that the Gun-Free Schools Zone Act did not contain a jurisdictional element that "would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce" or that would limit the Act's reach "to a discrete set of firearms possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562, 115 S. Ct. at 1631. This Court rejected the government's argument that the aggregated costs of gun-related crime had a substantial impact on the economy and adversely effected education, noting that such an argument would provide Congress with a general police power like that retained by the states allowing it to

regulate virtually any individual activity. *Id.* at 564-67, 115 S. Ct. at 1632-33.

In *Morrison*, the Court stated that "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Morrison*, 529 U.S. at 618, 120 S. Ct. at 1754 (*citing Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257 (1821)). "[T]he Constitution reserves the general police power to the States . . . and cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate." *Id.* at 619, 120 S. Ct. at 1754, Fn. 8 (citations omitted).

With the exception of the provisions of the Act prohibiting the sale and transportation of endangered species, which are not at issue in this case, the non-economic, criminal nature of the activities regulated by the Act is similar to that in *Lopez* and *Morrison*. Unlike guns, however, it is not alleged that endangered species are currently of commercial value, only that someday their genetic heritage might be of some currently incalculable value to society. *See Building Industry Association of Superior California v. Babbitt*, 979 F. Supp. 893, 907 (D.C. 1997). The District Court does make reference to the possibility that these species may affect the "interstate movement of persons . . . who come to a state to observe and study [them.]" *Id.* Yet this very argument was rejected by this Court in *Morrison* as too attenuated to qualify as a substantial effect on commerce under *Lopez's* third prong. *See Morrison*, 529 U.S. at 613, 120 S. Ct. at 1752.

Of all the provisions in the Act, the anti-takings provision has the most attenuated connection to interstate commerce and the highest risk of interfering with inherent state rights, yet Congress failed to include a jurisdictional limitation to ensure that activities prohibited by the anti-takings provision were within its Commerce Clause authority. There are no substantive or procedural provisions in place to prevent the Service from intensely regulating non-economic intrastate activities (such as a child riding a bicycle or running in his own yard and inadvertently stepping in a vernal pool where a fairy shrimp might lie), as a means of wildlife protection.

The Act's anti-takings provision, as interpreted by the District Court and the D.C. Circuit Court of Appeals, delegates Congressional authority to the Service to regulate virtually any private activity that may affect an endangered species or the habitat thereof, regardless of whether it is wholly intrastate or non-economic in nature. This unfettered authority is not limited to regulating activities that substantially affect interstate commerce, but instead is intended as a general police power implemented to protect the interests of mankind in preserving the genetic heritage of such species. The Constitution does not give Congress the unfettered authority to define what commerce is, but merely provides Congress with the authority to regulate such commerce among the several states. U.S. Const., Art. I, § 8, cl. 3. Congress has clearly exceeded its Commerce Clause authority insofar as the Act regulates intrastate non-economic activities. This improperly impedes upon the authority inherently reserved to the states, particularly the states' rights to

regulate property within their borders, to enact and enforce criminal laws regulating intrastate activity, and to exercise general police powers to protect the general safety and welfare of their citizens.

The decisions below are more than a mere misapplication of *Lopez* and *Morrison*. They reveal a mindset that if an issue is important enough as a policy matter, there is no effective limit on the power of the federal government to criminalize private conduct that is neither in nor substantially affects interstate commerce. The concept of vast federal power is so ingrained in our society that even learned federal jurists have difficulty accepting the direction of the framers of our Constitution and of this Court that there are indeed limits to federal power. This case will help determine whether *Lopez* and *Morrison* will be seen as interesting anomalies, limited to their unique facts, on the road to unrestricted federal power, or whether they reflect important principles for the protection of states and individual citizens which will be enforced by this Court from this day forward.

CONCLUSION

For the foregoing reasons, the amici States respectfully request this Honorable Court to grant the petition for certiorari.

Respectfully submitted,

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